MiFID II

Compliance function and complaints handling

Key Points

- Under MiFID II, the MiFID I high-level requirements in relation to the compliance functions of investment firms will be replaced by more detailed rules
- The rules on complaints handling will also become more detailed and specific
- In December 2014, ESMA produced technical advice setting out the proposed MiFID II requirements for both topics
The compliance function

Under the MiFID I regime, the compliance function in a regulated firm has a specific role, which is set out in several high-level statements. Article 13(2) of the MiFID I Directive states that:

“An investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm, including its managers, employees and tied agents with its obligations under this Directive as well as appropriate rules governing personal transactions by such persons.”

This MiFID I obligation for an investment firm to have adequate policies and procedures to ensure compliance is carried forward in identical terms in MiFID II.¹

The high-level statement in the MiFID I Directive is supplemented by the MiFID Implementing Directive, which sets out the role of the compliance function in ensuring the compliance of the firm with its MiFID obligations. The provisions in the MiFID Implementing Directive are intended to ensure that the compliance function monitors policies and procedures within the firm, advises relevant persons in the firm, has the necessary authority, resources, experience, and access to information, is not involved in the services that it monitors, and is able to function objectively.²

This is subject to the principle of proportionality, namely that the compliance function should be appropriate to the:

- nature, scale and complexity of the business; and
- nature and range of its services and activities.

Following the implementation of MiFID I, ESMA proposed guidelines to reinforce the role of the compliance function.³ By issuing these guidelines, ESMA intended to supplement the high-level principles in MiFID I with more concrete examples of best practice. These guidelines have been used as the basis for new requirements under MiFID II.

ESMA proposals for the compliance function under MiFID II

In its May 2014 consultation paper, ESMA proposed new features for the MiFID II regime in relation to the requirements for compliance functions. It recommended that firms should ensure that the compliance function:

- carries out a compliance risk assessment;
- adopts a risk-based approach when establishing its monitoring programme;
- establishes a permanent risk-based monitoring programme that takes into consideration all areas of the firm’s investment services, activities and any relevant ancillary services;
- sends regular (at least annual) compliance reports to the firm’s management body, on the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified, and on complaints handling reporting;
- has its compliance officer appointed and replaced by the management body or, if applicable, the supervisory function;
- reports directly to the management body whenever a significant compliance risk is detected, e.g. a significant risk of failure to comply with MiFID;
- should perform tasks on a permanent basis; and
- should have oversight of the complaints process, and should consider complaints to be a source of information for its monitoring responsibilities.⁴

¹ MiFID II Directive, article 16(2)
² MiFID Implementing Directive, article 6.
³ ESMA, Final report: Guidelines on certain aspects of the MiFID compliance function requirements, 6 July 2012, ESMA/2012/388.
⁴ ESMA, Consultation Paper, 22 May 2014, chapter 2.3; ESMA, Final Report: Technical Advice to the Commission on MiFID II and MiFIR, 19 December 2014 (ESMA/2014/1569) (the “Technical Advice”), chapter 2.3.
In its final report in December 2014, ESMA integrated these new requirements for the compliance function into its technical advice alongside the existing provisions of the MiFID Implementing Directive as described above.

ESMA’s final report also clarified the meaning of the new requirement that firm maintain a “permanent” compliance function. According to ESMA, this implies that firms should arrange for the role of compliance officer to be covered during his or her absence, and ensure that the responsibilities of the compliance function are performed on an ongoing basis.5

## Complaints handling

### Complaints handling in MiFID I

Under the MiFID Implementing Directive, firms are required to have procedures for the effective handling and recording of complaints from their customers. Specifically, firms must:

- have effective and transparent procedures for the reasonable and prompt handling of complaints received from retail clients, including potential retail clients; and
- keep a record of each complaint and the measures taken for its resolution.6

### Complaints handling in MiFID II

Under MiFID II, this provision has been removed and will be replaced by more detailed requirements in the MiFID II implementing measures. ESMA considers that the high-level approach under MiFID I should be replaced by more detailed rules. It has noted that the G20 produced high-level principles on financial consumer protection in October 2011, and ESMA itself participated with the European Banking Authority (“EBA”) in a joint consultation on draft guidance on complaints handling in October 2013.7 ESMA has stated that the G20 principles and the joint ESMA/EBA consultation should be treated as the basis for the MiFID II implementing measures.8

The technical advice issued by ESMA states that:

- Firms should establish and maintain a complaints management policy. This should have clear, accurate and up-to-date information on the firm’s complaints handling process, and should be endorsed by the firm’s management body.
- Firms should publish details of the process to be followed when handling a complaint, which should be provided on request or when acknowledging a complaint.
- Clients, and potential clients, should be able to submit complaints free of charge.
- Firms should have a complaints management function that enables complaints to be investigated. This role may be carried out by the compliance function.
- Firms should communicate to clients in plain language that is clearly understood and provide a response to the complaint without any unnecessary delay.
- Firms should explain to clients and potential clients the firm’s position on the complaint and set out the client’s options, where relevant, to refer to an alternative dispute resolution (“ADR”) entity, or for the client to take civil action.
- Firms should provide information on complaints and complaints handling to the relevant national competent authority (“NCA”) or ADR entity.
- Firm’s compliance functions should analyse complaints and complaints handling data to ensure that they identify and address any issues.

In its Technical Advice in December 2014, ESMA provided further commentary. In response to feedback from respondents to its consultation paper, ESMA emphasised that under MiFID II, the complaints handling requirements should apply to all clients, including professional clients, regardless of whether they are per se or elective professional clients. ESMA has further reiterated that the requirements will apply to potential clients of firms, noting that the complaints guidelines define a complaint as a statement of dissatisfaction addressed to a firm by a client or a

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5 ESMA, Technical Advice, 19 December 2014, chapter 2.3
6 MiFID Implementing Directive, article 10.
7 ESMA/EBA Consultation Paper on draft guidelines for complaints handling (6 November 2013) JC-CP-2013
8 ESMA, Consultation Paper, 22 May 2014, chapter 2.4.
potential client relating to the provision of investment services. ESMA believes that this concept can prove useful in the application of the proposed requirements.  

ESMA noted that the draft technical advice did not explain clearly what “details” of the firm’s complaints handling process should be published. In the final Technical Advice, this was amended to state that the information should include information about the firm’s complaints management policy and contact details of the complaints management function.

**Timescales for implementation**

The MiFID II Directive and MiFIR came into force on 3 July 2014. Most of their provisions are currently stated to come into effect in member states from 3 January 2017, with member states having until July 2016 to transpose the MiFID II Directive into national law.

However, following discussions between ESMA and the European Commission, it is now expected that the implementation of MiFID II will be delayed until January 2018.

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9 ESMA, Technical Advice, 19 December 2014, chapter 2.4.
10 ESMA, Technical Advice, 19 December 2014, chapter 2.4.
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